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No. 98-8384

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1998

TERRY WILLIAMS,

Petitioner-Appellee,

v.

JOHN TAYLOR, Warden,
Sussex 1 State Prison,

Respondent-Appellant.

On Petition for a Writ of Certiorari to the
Court of Appeals for the Fourth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI AND STAY OF EXECUTION

I. INTRODUCTION

On March 5, Terry Williams filed a Petition for Certiorari with this Court seeking review of the Fourth Circuit's decision reversing the decision of the federal district court that vacated Williams's sentence of death and ordered a new sentencing hearing. Contrary to the Commonwealth's assertion in its Opposition to the Petition, the basis for Williams's Petition is eminently certworthy.

First, Williams urges the Court to grant certiorari to correct the Fourth Circuit's skewed application of Strickland v. Washington, 466 U.S. 668 (1984), which (a) incorporated

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a "windfall" analysis for determining prejudice in "non-windfall" cases; (b) precluded a showing of prejudice even if a reasonable, conscientious and impartial juror would have been swayed by the omitted evidence to vote for life; and (c) adopted a rule that prejudice can never be shown if aggravating circumstances outweigh mitigating circumstances even if the original sentence was statutorily barred from "weighing" the evidence in the first instance. Because these systemic errors with the dire consequences they portend for the numerous capital habeas litigants who pass through the appellate court's gate conflict with this Court's settled jurisprudence, certiorari is imperative to provide the necessary correction.

Second, Williams urges this Court to grant certiorari to settle the unreconcilable split in the circuit courts over the appropriate standard of review under the Anti-Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. §2254(d)(1). With respect to both the "contrary to" and "unreasonable application of" prongs of section 2254(d)(1), which defines the parameters of review for lower state court conclusions of law, the Fourth Circuit stands at the extreme end of an increasingly broad divide among the circuits. The "interpretive conundrum of the statute," as recognized even by the Fourth Circuit[1] has reached fever pitch. Without this Court's articulation of a clear and universally applicable rule of law, the imposition of the death penalty will assume a freakishness that can ultimately have but one result -- that is, to render the death penalty unconstitutional under the Eighth Amendment to the U.S. Constitution.[2]

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[1]Green v. French, 143 F. 3d 865, 870 (4th Cir. 1998).

[2]With respect to the AEDPA, the issues raised in Williams's Petition are issues very similar to those raised in the petitions for certiorari filed with this Court in Johnson v. Moore, 164 F.3d 624, 1998 WL 708691 (4th Cir. 1998) (unpub. op.), petition for cert. filed (U.S. Jan. 19, 1999) (No. 98-7820) and Swann v. Taylor, No. 98-20, 1999 WL 86690 (4th Cir. Feb. 18, 1999), petition for cert. filed (U.S. Mar. 23, 1999). Both cases are currently pending for resolution.

II. THE COMMONWEALTH'S OPPOSITION FAILS TO UNDERCUT THE COMPELLING REASONS WHY CERTIORARI SHOULD BE GRANTED IN THIS CASE

A. The AEDPA Claims Are Neither Moot Nor Meritless

1. The Commonwealth's Claim of Mootness Is Frivolous

The Commonwealth claims that "Williams' argument about the Fourth Circuit's interpretation of §2254(d) is a moot point because his allegations of ineffective trial counsel were considered de novo by the Fourth Circuit under the Strickland v. Washington standard and found insufficient to warrant relief." (Commonwealth's Brief in Opposition to Petition for Writ of Certiorari ("Brief in Opposition") at 17.) Because the Fourth Circuit "expressly agreed" with the Virginia Supreme Court, the Commonwealth maintains, the court's conclusion that the supreme court's rejection of the writ was reasonable is merely an "alternative ruling" that "cannot serve as a basis for granting certiorari." (Brief in Opposition at 17.)

This proposition is absurd on its face and, notably, unencumbered by citation to legal authority. As an initial matter, there is absolutely no reference in the Fourth Circuit's decision to any "alternative ruling" or any hint whatsoever that its decision is free-floating and independent of the AEDPA's standard of review. Moreover, were that so, the list of egregious errors made by the Fourth Circuit in the resolution of this case would have grown by one: namely, abandonment of the standard of review dictated by the AEDPA.

The speciousness of this claim is no better seen than in the Commonwealth's contradictory assertion elsewhere in its Opposition that "§2254(d) has abrogated de novo review." (Brief in Opposition at 20 (emphasis added).) Unwittingly exposing the weakness of its mootness claim, even the Commonwealth cannot escape the obvious conclusion that the standard of review

of state court decisions granting a writ of habeas corpus is inextricably tied to section 2254(d)(1), and that there is no such thing as "independent" review. In short, while the Commonwealth understandably prefers to avoid a potential and likely determination that the Fourth Circuit's interpretation of that standard is incorrect, its proffered claim of mootness fails utterly to provide that escape hatch.

2. The Commonwealth's Attempt to Gloss Over the Glaring Differences Among the Circuit Courts on the Proper Scope of the AEDPA Is Unavailing

a. Williams's AEDPA Claims Are All Properly Before the Court

The Commonwealth claims that the "contrary to" analysis is not properly before this Court because the Fourth Circuit made no findings with respect to the AEDPA's "contrary to" prong. The record, however, does not support this barren claim. To the contrary, a review of the District Court decision, the Fourth Circuit decision, and the parties' briefs to the Fourth Circuit all reflect a focus on both the "contrary to" and the "unreasonable application of" prongs of the AEDPA, making both proper for this Court's review.

The scope of this case is keyed directly to the District Court's decision granting the writ and vacating Williams's death sentence. Carefully applying the AEDPA's section 2254(d)(1) standard of review, the District Court concluded that the Virginia Supreme Court's decision finding no Strickland prejudice was "contrary to and involved an unreasonable application of clearly established federal law." (App. 1 at 9-10, 14, 30-34).[3]

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[3]"App." references are to the Appendices submitted in support of the Petition for Certiorari which include, among other things, the decision of the District Court ("App. 1") and the recommended findings of fact and conclusions of law of the state circuit court judge in support of a new sentencing hearing ("App. 2").

In response to the Commonwealth's challenge to the District Court's abundantly correct conclusion that he had been denied effective assistance of counsel at his sentencing trial, Williams squarely raised both prongs of the AEDPA's standard of review. Specifically, in defending the District Court's conclusion that the Virginia Supreme Court decision was deeply flawed from the Commonwealth's attack, Williams argued:

> The Warden is wrong on both counts. As shown, the Virginia Supreme Court's opinion was 'contrary to or involved an unreasonable application of clearly-established Federal law,' 28 U.S.C. §2254(d)(1), because it incorporated an inappropriate 'weighing' analysis into Strickland's prejudice prong and replaced Strickland's test with the more demanding 'windfall' analysis of Lockhart v. Fretwell. See, e.g., Neelley v. Nagle, 138 F.3d 917 (11th Cir. 1998) (decision 'contrary to' clearly-established Supreme Court law when state court fails to apply correct legal standard).

(See Answering and Opening Brief of Appellee/Cross-Appellant at 32; see also id. at 59.) The Fourth Circuit's response that "[t]he Virginia Supreme Court's conclusion that Williams's trial counsel were not ineffective during the sentencing phase of Williams's trial was not contrary to, or an unreasonable application of, clearly established Supreme Court precedent," Williams v. Taylor, 163 F.3d 860, 863 (4th Cir. 1998), thus clearly reflected the debate as presented to the Court.[4] Having pressed both prongs into service in the Fourth Circuit, it comes with poor grace

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[4]Indeed, the Fourth Circuit specifically noted that the Commonwealth invoked both prongs in challenging the District Court's decision:

> On appeal, the Commonwealth contends that the district court erred in granting Williams federal habeas relief. In particular, the Commonwealth argues that the Virginia Supreme Court's conclusion that Williams's trial counsel were not ineffective was neither contrary to, nor an unreasonable application of, clearly established Supreme Court precedent.

163 F.3d at 865 (emphasis added).

for the Commonwealth now to disavow its position and, worse, erroneously assert that Williams has somehow defaulted his claim that the Fourth Circuit's interpretation of the "contrary to" prong defies the AEDPA, logic and Article III of the United States Constitution.

b. Courts Are Hopelessly Divided
Over the Proper Interpretation of the AEDPA

The Commonwealth's attempt to cleanse the judicial landscape of any split in the federal circuits is but a transparent effort to avoid the day of reckoning over the issue that has so divided the circuit courts: the appropriate reach of the federal courts in reviewing habeas corpus claims in light of 28 U.S.C. §2254(d)(1).

As an initial matter, to assert as the Commonwealth does (Brief in Opposition at 18), with respect to the "contrary to" prong, that the "alleged conflict" between the Fourth and the First Circuits is "non-existent" is overreaching of the worst order. Indeed, the very quotations relied on by the Commonwealth from Green, supra, and O'Brien v. Dubois, 145 F.3d 16 (1st Cir. 1998), do not deflate the conflict but, rather, graphically illustrate it. Thus, contrary to Green, which requires "facts indistinguishable in any material way," the First Circuit in O'Brien looks only for "factual similarity." With respect to the applicable legal principle involved, the Fourth Circuit requires the "identical issue." The First Circuit, on the other hand, looks only for "the distillation of general federal law precepts into a channeled mode of analysis specifically intended for application to variant factual situations." O'Brien, 145 F.3d at 25 (emphasis added).

Likewise, the Commonwealth's effort to wash away the split with respect to the "unreasonable application of" prong with the bland truism that all courts "agree that strong deference is required to the state court decision on the prisoner's claim" (Brief in Opposition at

19) purposely and disingenuously understates the narrowness of the Fourth Circuit's interpretation. Indeed, to declare the Fourth Circuit's constricted interpretation merely the prosaic "concept of respect for reasonable decisions by state courts"[5] so minimizes the draconian sweep of the Fourth Circuit's interpretation that reasonable minds must seriously question the Commonwealth's analysis of any of the cases it seeks to distinguish in its Opposition to this Court.

Contrary to the Commonwealth's assertion, the circuits are, indeed, deeply divided over the proper interpretation of section 2254(d)(1), that division best reflected by the position of the Fourth, Fifth and Eleventh Circuits, on the one hand, and the First and the Seventh, on the other hand. Try as the Commonwealth might, there is simply no sound basis upon which to reconcile these diametrically opposed positions. Thus, the conclusion of the Fourth and the Fifth Circuit that a state court decision is impervious from collateral attack unless "state courts have decided the question by interpreting or applying the relevant precedent in a manner that reasonable jurists would all agree is unreasonable"[6] cannot be squared with the First Circuit's view, as expressed in O'Brien, 145 F.3d at 16, 25, that the appropriate test is "objective reasonableness" and that to the "extent that inferior federal courts have decided factually similar cases, reference to those decisions is appropriate in assessing the reasonableness *vel non* of the state court's treatment of the contested issue."

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[5]Brief in Opposition at 20.

[6]Williams v. Taylor, 163 F.3d at 865, quoting Green, 143 F.3d at 870; see also Drinkard v. Johnson, 97 F.3d 751, 769 (5th Cir. 1996), cert. denied, 520 U.S. 1107 (1997).

Applying that dichotomy of opinion to this particular case graphically illustrates the key difference of judicial opinion on this issue. Under the Fourth Circuit's "all reasonable jurists" analysis, Williams can never prevail because, in his case -- as evidenced by the divergence of views expressed by the state circuit court and the District Court, on the one hand and the Virginia Supreme Court and the Fourth Circuit, on the other hand -- all reasonable jurists do not agree on the outcome of this case -- *ergo*, Williams cannot prevail. Under the First Circuit's approach, however, reference to "inferior federal court" decisions that are "factually similar" to this case demonstrates that Danville Circuit Court Judge Ingram's conclusion that Williams had not received a fair sentencing hearing due to his trial counsel's ineffectiveness[7] was abundantly reasonable and thus Williams's death sentence should be vacated and a new sentencing trial ordered.[8]

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[7]The Commonwealth attempts to diminish the weight of Danville Circuit Court Judge James Ingram's well-reasoned and well-founded decision in this case by arguing that he wrongly relied on a per se prejudice analysis. (Brief in Opposition at 5 n.1.) The Virginia Supreme Court's erroneous conclusion in this regard, which the Commonwealth advances here, is borne of its own flawed interpretation of Strickland. Moreover, a plain reading of Judge Ingram's decision reflect no variation from well-recognized and accepted Strickland principles and, if anything, emphasized his recognition of the burden Williams faced in meeting the Strickland test. Specifically, he explained that

> it is insufficient to show only that the errors had some conceivable effect on the outcome of the proceeding, because virtually every act or omission of counsel would meet that test. [citation omitted.] The petitioner bears the "highly demanding" and "heavy burden" in establishing actual prejudice. [citations omitted].

(App. 2 at 39 (emphasis added).)

[8]Williams made this precise argument in his Petition. (See Petition for Certiorari at 35-38.) Accordingly, the Commonwealth's assertion (Brief in Opposition at 21) that Williams "does not even assert, nor could he, that he would be entitled to relief under any of the interpretations of §2254(d)" is thus plainly incorrect.

The Commonwealth's effort to massage the glaring differences in language and result of these two bodies of opinion by reference to the Sixth Circuit's recent decision in Nevers v. Killinger, No. 98-1039, ___ F.3d ___, 1999 WL 97993 (6th Cir. Mar. 1, 1999), which sought to meld the Fourth and Fifth Circuits' test with that of the First Circuit, is unavailing. Rather than resolve the conflict among the circuits, Nevers only demonstrates the confusion and, worse, adds to it. Indeed, although Judge Bright concurred in the result, he disagreed with the majority's interpretation of the "unreasonable application of" prong. In his view, the "amalgamation of the two standards [of the First and Fifth Circuits] creates too rigid a bar to proper relief" and "approaches a suspension of the Writ of Habeas Corpus." Nevers, 1999 WL 97993 at *29.

Finally, the Commonwealth's argument (Brief in Opposition at 21-22) challenging Williams's claim that the Fourth Circuit's interpretation of section 2254(d)(1) offends Article III barely limps to the finish-line. To rely primarily on the Fourth Circuit's decision in Green as support for the proposition that the Fourth Circuit's interpretation does not violate Article III is bootstrapping of the worst order, and cannot be cured merely by citation to Lindh v. Murphy, 96 F.3d 856 (7th Cir. 1996), rev'd on other grounds, 521 U.S. 320, (1997), Felker v. Turpin, 518 U.S. 651 (1996) and Lonchar v. Thomas, 517 U.S. 314 (1996).

III. THE *STRICKLAND* CLAIMS

As discussed above, and in the Petition, the Fourth Circuit's exceedingly pinched interpretation of the AEDPA's standard of review of legal determinations is inextricably tied to its incorrect decision in this case. Believing itself required to defer to the Virginia Supreme Court's plainly incorrect legal analysis in this case because, as evidenced by the very

disagreement among the judges in this case, all reasonable jurists did not agree to grant the writ, the Fourth Circuit denied relief. In so doing, the court adopted the errors made the Virginia Supreme Court in analyzing and applying Strickland v. Washington, 466 U.S. 668 (1984), and made more of its own. These errors, as set forth below and as more fully explained in the Petition, are neither "routine" nor merely "fact-bound,"[9] but rather speak to a systemic and recurring dysfunction in the Fourth Circuit's analysis of Strickland prejudice.[10] Because the only means of correction lies with this Court, a grant of certiorari is essential.

A. *Strickland* Prejudice May Not Be Determined by Weighing in a Non-Weighing State

The Commonwealth dismisses as "frivolous"[11] Williams's claim that the Virginia Supreme Court erred by weighing the aggravating evidence against the mitigating evidence to conclude that a sentence of death was appropriate. Notably, the Commonwealth concedes that the Virginia Supreme Court in fact weighed the evidence, but contends that it did so "without regard to the separate and independent term of art describing a State's death penalty regime." (Brief in Opposition at 16.)[12]

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[9]Brief in Opposition at 10, 13; see also Commonwealth's Question Presented No. 1.

[10]The Fourth Circuit's skewed interpretation of Strickland's "prejudice" prong is the focus of Williams's challenge. Notably, neither the Fourth Circuit nor the Virginia Supreme Court disturbed the findings of both the District Court and the state circuit court that Williams's trial counsel's performance was professionally inadequate.

[11]Brief in Opposition at 16.

[12]Significantly, the Commonwealth has shied away from the assertion it pressed before the Fourth Circuit -- and one which the Fourth Circuit unwittingly accepted, Williams, 163 F.3d at 869 -- that this Court did not recognize "weighing" as a term of art until Clemons v. Mississippi, 494 U.S. 738 (1990), six years after Strickland issued. (See Commonwealth's Reply and Answering Brief to the Fourth Circuit at 4.) The Commonwealth now concedes (Brief in Opposition at 15 n.7) that "weighing" assumed an extra-ordinary dimension after Zant v.

Given that the Virginia Supreme Court's decision tracks, *verbatim*, the language of the Florida state "weighing" statute, this assertion is paper-thin. The error of the Virginia Supreme Court is its failure to identify correctly the rule of law Strickland produced: namely, that to demonstrate ineffective assistance of counsel that rises to the level of a constitutional violation, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. at 6594. The Commonwealth persists in this error and maintains that Strickland's rule of law, which the Commonwealth views as globally applicable, is "whether there is a reasonable probability that 'the balance of aggravating and mitigating circumstances did not warrant death.'" (Brief in Opposition at 16, quoting Strickland, 466 U.S. at 695.) Strickland, however, stands for no such proposition and the Fourth Circuit should not be permitted to relax this Court's standards under the guise of AEDPA deference to state court decisions.[13]

B. *Lockhart* Does Not Provide the Applicable Rule of Law

The Commonwealth maintains that "[t]he Virginia Supreme Court's reference to Lockhart v. Fretwell, 506 U.S. 364 (1993), does not even remotely suggest that the state court somehow agreed with Williams's contention that a different outcome at sentencing was reasonably probable, or that the state court considered such a result a "windfall." (Brief in

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Stephens, 462 U.S. 862 (1983), a case that predates Strickland by one year.

[13]Finally, the Commonwealth's reliance on the Fourth Circuit's assertion, Williams, 163 F.3d at 870, that it has "weighed" aggravating and mitigating circumstances to uphold a sentence of death in previous cases hardly justifies its error in this case. Compare Plath v. Moore, 130 F.3d 595, 602 (4th Cir. 1997), cert. denied, 118 S. Ct. 1854 (1998); Fitzgerald v. Greene, 150 F.3d 357, 368 (4th Cir.), cert. denied, 119 S. Ct. 389 (1998). To the contrary, it underscores the Fourth Circuit's unthinking adherence to a faulty rule of law and the urgent need for this Court to intervene to protect and preserve Strickland from likely future erosion.

Opposition at 11.) Rather, as the Commonwealth sees it, the Virginia Supreme Court's only reference to Lockhart was to support the proposition that failure to focus on "whether the result of the proceeding was fundamentally unfair or unreliable [] is defective." (Brief in Opposition at 11.) This assertion, however, conveniently reads the offending Lockhart language right out of the Virginia Supreme Court's decision.

In setting forth the legal principles it deemed applicable to the resolution of this particular case, the Virginia Supreme Court stated the following:

> "As is obvious, Strickland's demanding standard, although by no means insurmountable, is highly demanding." Kimmelman v. Morrison, 477 U.S. 365, 382 (1986). Accord Strickler, 249 Va. at 128, 452 S.E. 2d at 652. Moreover, "an analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective." Lockhart v. Fretwell, 506 U.S. 364, 369 (1993). And "[t]o set aside a conviction or sentence solely because the outcome would have been different but for counsel's error may grant a defendant a windfall to which the law does not entitle him." Id. at 369-370.

Williams v. Warden, 487 S.E. 2d 194, 198 (Va. 1997) (emphasis added). To adopt the Commonwealth's position asserted here, one must presume that the Virginia Supreme Court's quotation of Lockhart's "windfall" language was inadvertent and that its choice of words and legal principles was merely accidental. Given the other serious error in the Virginia Supreme Court's analysis -- namely, the "weighing" of aggravators and mitigators in a non-weighing state -- the Commonwealth cannot reasonably ask that this defect in describing the applicable legal principles also be ignored.[14]

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[14]Hays v. Alabama, 85 F.3d 1492, 1496 (11th Cir. 1996), cert. denied, 520 U.S. 1123 (1997); United States v. Kissick, 69 F.3d 1048 (10th Cir. 1995), and Flamer v. Delaware, 68 F.3d 710 (3d Cir. 1995), cert. denied, 516 U.S. 1088 (1996), upon which the Commonwealth

C. *Strickland*'s "Reasonable Probability" Test Requires an Evaluation of the Effect of the Omitted Mitigation Evidence on One Juror

In granting relief to Williams in this case, the District Court concluded that "there is a reasonable probability that had the jury heard [the omitted mitigation evidence] at least one juror and perhaps all, would have concluded that the death penalty was not warranted." (App. 1 at 30.) The Fourth Circuit rejected this analysis on the ground that Strickland prejudice cannot be shown even if "one hypothetical juror might by swayed by a particular piece of evidence." Williams v. Taylor, 163 F.3d at 868.

The Commonwealth virtually ignores the substantial split in the circuits[15] that exists on this issue. In so doing, the Commonwealth plainly mistakes Williams's argument as urging relief where one juror who "has a propensity to view his case more favorably than his colleagues" might have been swayed by the omitted mitigation evidence. As the Petition makes clear, however, Williams asserts only that the determination of Strickland prejudice cannot be made in a vacuum and that the mathematical probabilities inherent in persuading one juror as opposed to twelve -- which is all that is required under Virginia law -- cannot be ignored. The

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(Brief in Opposition at 13 n.4) and the Fourth Circuit (Williams v. Taylor, 163 F.3d at 869) rely to support the Virginia Supreme Court's analysis in this case do not stand for so broad a proposition. Thus, in all of those cases, the appellate courts relied on Lockhart only for the unremarkable proposition that the ultimate inquiry should be whether the proceeding was "fundamentally fair" and "reliable." Those cases did not, however, rely on a "windfall" analysis, as did the Virginia Supreme Court, and thus provide no support for the Commonwealth's assertion that Lockhart is "merely a reiteration of Strickland prejudice, not an alteration of the Strickland standard (Brief in Opposition at 12.)

[15]As discussed in detail in his Petition (see Petition at 17-22), the Seventh, Ninth and Eleventh Circuits have adopted the District Court's "effect-on-one-juror" approach for evaluating Strickland prejudice.

mathematical probabilities on which Williams bases his argument assume, of course, that any "one juror" is the quintessential reasonable, conscientious and impartial juror. The Commonwealth's argument to the contrary is an obvious "red herring" that may be comfortably ignored by this Court.

IV. CONCLUSION

For the foregoing reasons, the Court should grant certiorari in this case.

Respectfully submitted,

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